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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Revision of Part 22 and Part)	WT Docket No. 96-18
90 of the Commission's Rules)	
to Facilitate Future Develop-)	
ment of Paging Systems)	
)	
Implementation of Section)	PP Docket No. 93-253
309(j) of the Communications)	
Act - Competitive Bidding)	

To: The Commission, en banc.

PETITION FOR RECONSIDERATION

Kenneth E. Hardman
MOIR & HARDMAN
2000 L Street, N.W., Suite 512
Washington, DC 20036-4907
Telephone: (202) 223-3772
Facsimile: (202) 833-2416

Attorney for Advanced Paging, Inc.,
Mark A. Apsley, Capitol Radio-
telephone Company, Inc., Danny's
Two Way Communications, Inc.,
Express Message Corporation,
A. V. Lauttamus Communications,
Inc. and NEP, LLC

April 11, 1997

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SUMMARY OF PETITION FOR RECONSIDERATION

The Commission lawfully should award geographic licenses without an auction to incumbent licensees who demonstrate prior to the auction that they already meet the five-year coverage requirement otherwise established for permanent retention of geographic licenses.

1. This issue is no different in principle than awarding nationwide licenses without an auction to those incumbents already qualifying for nationwide exclusivity. The SR&O thus unlawfully discriminates between nationwide licensees and Major Trading Area and Economic Area licensees.

2. The SR&O is incorrect when it contends that the "open eligibility for bidding" policy will "result in further wide-area coverage of paging services" where the incumbent already meets the five-year coverage requirement. The fact is that the policy will actually stifle expansion of wide area service and will, perversely, deny service improvements to the majority populations within the licensed geographic areas.

3. The SR&O encourages speculation and "greenmail" tactics that the Commission ordinarily considers contrary to the public interest.

4. The only purpose actually served by requiring incumbents who already meet the five-year coverage requirement to bid in an auction is to artificially inflate the bidding, contrary to the express requirements of 47 U.S.C. §309(j)(7).

5. The practical effect of the SR&O's discrimination in favor of nationwide licensees is to erect additional barriers to competition by the many small businesses that typically are incumbents in the Major Trading Areas and Economic Areas, contrary to 47 U.S.C. §309(j)(4)(C).

6. The effect of permitting other entities to bid on licenses for areas in which the incumbent already meets the five-year coverage requirement is to permit "unqualified" applicants to bid, contrary to 47 U.S.C. §309(j)(5), as well as to permit the filing of applications that historically would be considered "defective" and not entitled to consideration, likewise contrary to 47 U.S.C. §309(j)(5).

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To: The Commission, en banc.

PETITION FOR RECONSIDERATION

ADVANCED PAGING, INC., MARK A. APSLEY d/b/a PROGRESSIVE PAGING, CAPITOL RADIOTELEPHONE COMPANY, INC. d/b/a CAPITOL PAGING, DANNY'S TWO WAY COMMUNICATIONS, INC. d/b/a DAN COMM PAGING, EXPRESS MESSAGE CORPORATION, A. V. LAUTTAMUS COMMUNICATIONS, INC. d/b/a TRI-STATE PAGING, and NEP, LLC d/b/a NORTHEAST PAGING (collectively the "Petitioners"), by their attorney, hereby respectfully petition the Federal Communications Commission to reconsider and reverse, in part, its Second Report and Order and Further Notice of Proposed Rulemaking (the "SR&O") in the captioned proceeding, FCC 97-59, adopted February 19, 1997 and released February 24, 1997, 62 Fed. Reg. 11616 (March 12, 1997). Specifically, Petitioners request that the Commission reconsider and reverse its determination at ¶¶44-45 of the SR&O that all geographic area licenses (other than nationwide

licenses) should be subject to bidding in an auction, regardless of the extent to which incumbent licensees already cover the geographic areas to be included in the licenses. Petitioners respectfully submit that, at an absolute minimum, the Commission lawfully must award geographic licenses without an auction to any incumbent licensee that meets, prior to the first auction for such license, the five-year coverage requirement otherwise established by the Commission for permanent retention of geographic licenses. In support of their petition, Petitioners respectfully show:

Background

Insofar as is relevant to this petition, each of the Petitioners is an incumbent paging licensee providing commercial paging service on one or more frequencies heretofore licensed to them under Part 22 of the Commission's rules. More details concerning the areas they serve and the frequencies for which they are licensed are set forth hereinafter in Exhibits A through G annexed hereto.

In this proceeding the Commission has promulgated rules to transition the commercial paging industry (including Petitioners) to a system of geographic licenses, and to award such licenses pursuant to a scheme of competitive bidding. Part 22 VHF and UHF channels are to be licensed by Economic Area; and Part 22 931 MHz and Part 90 exclusive 929 MHz channels are to be licensed by

Major Trading Area. With the exception of certain nationwide channels (see SR&O at ¶¶50-54), the Commission determined that all geographic paging licenses will be subject to and awarded by an auction, in which essentially anyone meeting the citizenship requirements of the Communications Act will be permitted to participate. See SR&O at ¶¶44-45.¹

Argument for Reconsideration

The Commission's complete discussion of its decision to ignore incumbents in the auctions is contained in the following passage from the SR&O:

We are not persuaded by the commenters that channels already extensively used by an incumbent should be exempt from the competitive bidding procedures or that eligibility should be restricted to incumbent licensees. We believe that all otherwise qualified paging applicants should be eligible to bid for any geographic area license. We note that if an incumbent already has a significant presence in a geographic area, other potential applicants may choose not to bid for that geographic area. Nevertheless, we believe that the market, not regulation, should determine participation in competitive bidding for geographic area licenses. We believe that open eligibility for paging licenses will result in a more competitive auction and potenti-

¹ Although the Commission otherwise professes that only licenses where there are "mutually exclusive" applications will be auctioned, in establishing the ground rules it continues to allow applicants in the auction (over industry protest) the option of marking "all" markets generically on the short form application. See SR&O at ¶¶123, 126. By doing so, of course, the Commission is assuring that there will in fact be mutually exclusive applications for all geographic licenses that are subject to the auction, without exception. Thus, the Commission's ruling really is that all geographic licenses will be auctioned, with the sole exception of the nationwide licenses which the Commission has elected to exempt.

ally will result in further wide-area coverage of paging services.

SR&O at ¶45.

At the risk of vast understatement, the foregoing "discussion" is far short of the reasoned analysis required under the Administrative Procedures Act to sustain the Commission's decision.² In fact, the discussion is little more than facile rhetoric with no discernable relevance to the serious concerns raised in the comments. Moreover, to the extent there is any legitimate analysis in the discussion at all, it is either flatly wrong or egregiously misplaced. Therefore, the Commission lawfully should reconsider and reverse its position, and should award geographic licenses without an auction to any incumbent licensee that prior to the auction already meets the five-year coverage requirement otherwise mandated for permanent retention of a geographic license.³

At the outset, Petitioners point out that the issue here is no different in principle than the issue of awarding nationwide

² See, e.g., 5 U.S.C. §706(2) (admonishing a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ...").

³ See SR&O at ¶¶63, 64. In relevant part, a geographic licensee must provide coverage to two-thirds of the population of the licensed area within five years of the license grant. Subject only to the standards for license renewal (which would not be affected in any way by Petitioners' request), once the licensee has met that coverage requirement it may permanently retain the geographic license.

licenses without an auction to incumbent licensees that have already qualified for nationwide exclusivity. With respect to the nationwide channels, the Commission readily acknowledged the obvious fact that "it would not serve the public interest or be fair" to, in substance, deprive the incumbent nationwide licensees of the exclusivity for which they have already qualified in fact. SR&O at ¶50.

What the Commission improperly fails to acknowledge or account for in its decision is that exactly the same is true with respect to Economic Area or Major Trading Area licenses for which incumbents have already qualified for permanent exclusivity.

In addition, contrary to the Commission's contention, it is flatly and demonstrably untrue that "open eligibility for paging licenses" will "result in further wide-area coverage of paging services" (SR&O at ¶45) in the situation posed by Petitioners. As demonstrated in the annexed declarations, the fact is that permitting non-incumbents to win geographic licenses in this situation actual *stifles* the expansion of wide area service; it does not promote wide area service in any meaningful way.

This is so because the incumbents are frozen to their existing contours at the same time the geographic licensees are precluded by co-channel interference restraints from establishing any significant coverage in the area of license. Indeed, in some cases (e.g., the Wheeling Economic Area on 454.625 MHz), a non-

incumbent geographic licensee could not even locate a base station in the area of license, due to co-channel interference protection requirements.

Under these circumstances, the fact is that permitting non-incumbent licensees to win geographic licenses not only would not have the benefits postulated by the Commission, but doing so actually would have the perverse effect of denying service improvements to the vast majority of the population of the licensed area during the initial five-year term of the geographic license.

It is also grossly inadequate for the Commission to simply assert that "other potential applicants may choose not to bid" for geographic areas in which incumbents already have substantial coverage. SR&O at ¶45. What is at issue is the ability of speculators with little or no serious intention of providing service to extort "greenmail" from incumbent licensees as the price of allowing the incumbents to continue expanding their service areas during the initial five-year term of the geographic license.

The Commission professes to decry speculation when it discusses the need for coverage requirements (see SR&O at ¶63), and it otherwise professes to be opposed to the "greenmail" practices which previously flourished in Part 22 application

proceedings.⁴ Moreover, when it partially exempted incumbent licensees from the application freeze, the Commission necessarily acknowledged the vital need that paging carriers have to continually expand their systems in order to meet the mobile communications requirements of their customers.

Inexplicably, however, the Commission's decision at best permits -- and at worst overtly encourages -- speculators to bid for licenses with the hope that they can extort substantial sums from incumbent licensees for the right to expand their contours; and it does so notwithstanding that the Commission knows that incumbents will have little practical choice but to succumb to these demands if they are to remain competitive in the paging business.⁵

In this regard, it also may be useful to remind the Commission that the licensees which the Commission intends to anoint with nationwide channels without an auction are in fact the largest companies in the paging industry. Thus, while giving the largest competitors essentially a free ride with nationwide

⁴ See, e.g., *Report and Order (Part 22 Rewrite)*, 9 FCC Rcd 6513, 6549-6550 (FCC 1994) (discussing the etymology of §22.129 of the rules limiting the consideration that can be paid to settle contested proceedings).

⁵ The Commission evidently expects that its open eligibility policy for bidders will result in new entities bidding against incumbents, because it otherwise trumpets that the policy "will result in a more competitive auction". (SR&O at ¶45). It thus cannot pretend that the potential for speculation and "greenmail" is not a substantial concern.

channels on one hand, the Commission is simultaneously erecting yet another barrier to competition by incumbent licensees in the Major Trading Areas and the Economic Areas. Many, if not most, of these licensees are -- like Petitioners -- small, privately held businesses. Thus, the Commission's decision is not only egregiously discriminatory between incumbent nationwide licensees and other incumbents, but it also has a decidedly anti-small business tilt as well, contrary to the Commission's mandate to implement competitive bidding so as to "promote ... economic opportunity for ... small businesses". 47 U.S.C. §309(j)(4)(C).

It is no answer to argue that the incumbents can simply outbid the speculator/greenmailers, since the geographic license ultimately should have more economic value to the incumbent than to the specular/greenmailers. Doing so would merely mean that the incumbents were forced to artificially inflate their bidding, not to serve any identifiable public interest purpose, but simply to swell the government's treasury. Such a rationale, of course, is expressly forbidden by law. See 47 U.S.C. §309(j)(7).

Furthermore, even if the Commission could identify and exclude speculator/greenmailers from the auction (which it has never been able to do), that would still not safeguard incumbents from being forced to artificially inflate their bidding in order to obtain the geographic license. It is a fact that in prior similar auctions, such as the C-Block PCS and MMDS auctions, some

bidders employed a strategy whereby they would designate "all" markets on the short form application, regardless of the amount of their "up-front" payments, and then "park" bids from time to time in low-priced markets in which they had little or no genuine interest. They employed this strategy so that they could comply with the activity rules without prematurely bidding up the markets in which they were most seriously interested; and nothing in the rules prevents a similar strategy from being employed in this case. Thus, merely by having to participate in the auction at all, an incumbent that already meets the coverage requirements for a permanent geographic license risks being forced to artificially inflate its bidding in order to protect the license from bids by applicants which have no serious interest in the market in question.

In short, the Commission's stated preference for "the market, not regulation" determining participation in the auction (SR&O at \$45) is nonsensical. The Commission has absolutely failed to identify any market mechanism that has any defensible benefit where the incumbent already meets the five-year coverage requirement. To the contrary, the only identifiable market mechanism that does come into play in such case is the speculator/greenmailer that the Commission otherwise professes to decry.

The defects in the Commission's decision can be illustrated in other ways as well. Historically, a Part 22 applicant re-

questing a frequency that was not actually available due to the need to provide co-channel interference protection to an incumbent licensee would have its application dismissed at the threshold without consideration.⁶ In substance, such applications were deemed to be defective and thus not entitled to any consideration by the Commission.

So, here, the spectrum being applied for simply is "not available" for all practical purposes where an incumbent already meets the five-year coverage requirement. In such case the applicant historically would have had its application dismissed at the threshold as defective, without any consideration by the Commission. Here, however, the Commission inexplicably is encouraging "defective" applications to be filed, in sharp and unexplained contrast to its historical policy.⁷

Similarly, the Act expressly forbids the grant of any license awarded by competitive bidding "unless the Commission determines that the applicant is qualified". 47 U.S.C. §309(j)(5). It is impossible to understand how an applicant can

⁶ See, e.g., 47 C.F.R. §22.128(e) (1995) and its predecessor 47 C.F.R. §22.20 (1991).

⁷ Cf., 47 U.S.C. §309(j)(5) ("No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless ... such bidder's application is acceptable for filing."). Applications filed by non-incumbents would not be considered "acceptable for filing" by historical standards where the incumbent already meets the five-year coverage requirement.

be deemed to be a "qualified" applicant when it is physically unable to comply with the five-year coverage requirements due to fact that an incumbent already meets them. The Commission's decision is thus in conflict with this provision of the Communications Act as well.

In this regard, Petitioners point out that the notion that a geographic licensee may salvage the license at the end of five years by providing "substantial service" is manifestly untenable. See SR&O at ¶63. The concept is so vague and amorphous as to be legally meaningless in this context.

From the standpoint of the geographic licensee, attempting to use such a standard to extract forfeiture of its license at the end of five years doubtlessly would be held violative of the Administrative Procedures Act.⁸ This is so because the vague notion of "substantial service" cannot be said to fairly apprise the geographic licensee of the "facts or conduct" required to retain the geographic license at the end of the initial five-year period, if coverage requirements have not been met.

By the same token, the due process rights of the incumbent also are violated in that situation, because the incumbent

⁸ 5 U.S.C. §558(c) ("the ... revocation [] or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given -- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirement." (Emphasis added).

likewise has no meaningful notice of the standards another entity must meet in order to retain the geographic license at the end of the initial five-year term. Thus, the incumbent has no fair notice of what it must prove in order to bring about forfeiture of the license at the end of five years and recoup the right to expand its system.

Perhaps even more importantly, the incumbent also cannot meaningfully evaluate its initial bidding strategy for the auction, because it has no fair notice of what investment or other action other entities must take in order to successfully retain the geographic license at the end of the initial five-year term. Thus, it is precluded as a practical matter from making any rational economic analysis of value of the geographic license for bidding strategy purposes, a deficiency which all of the "due diligence" in the world cannot overcome.⁹

Conclusion

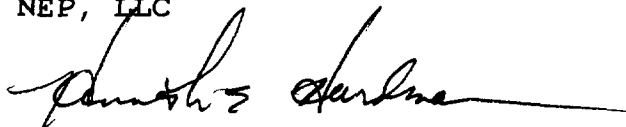
For the reasons stated above, Petitioners respectfully submit that the Commission's decision to require all Major Trading Area and Economic Area incumbents to bid in an auction

⁹ Independently of the Administrative Procedures Act, the same conclusion follows directly from *Salzer v. FCC*, 778 F.2d 869 (D.C.Cir. 1985) and its progeny. Given that the *quid pro quo* for stringent acceptability criteria is explicit notice of all application requirements," Petitioners submit that it likewise follows that the *quid pro quo* for loose eligibility standards for the auction is explicit notice of all requirements which must be met in order to retain the license at the end of the initial five-year period.

for the geographic licenses, regardless of whether or not they already meet the five-year coverage requirements mandated for permanent retention of the license, is improvident and contrary to law. Accordingly, Petitioners request that the Commission reconsider and reverse its determination, and that it instead award geographic licenses without an auction to those incumbent licensees who can demonstrate, prior to the auction, that they already meet the five-year coverage requirements otherwise imposed for geographic licensees.

Respectfully submitted,

ADVANCED PAGING, INC.
MARK A. APSLEY
CAPITOL RADIOTELEPHONE
COMPANY, INC.
DANNY'S TWO WAY
COMMUNICATIONS, INC.
EXPRESS MESSAGE CORPORATION
A. V. LAUTTAMUS
COMMUNICATIONS, INC.
NEP, LLC



By: Kenneth E. Hardman

Their Attorney

MOIR & HARDMAN
2000 L Street, N.W.
Suite 512
Washington, DC 20036-4907
Telephone: (202) 223-3772
Facsimile: (202) 833-2416

April 11, 1997

EXHIBIT A -- DECLARATION OF ALAN YODER

DECLARATION OF ALAN YODER

ALAN YODER hereby states as follows:

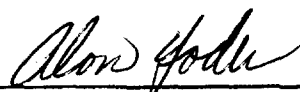
I am the President of Advanced Paging, Inc. (API), licensee of PARS Station KNKM287 and related stations, which API uses to provide local commercial paging service on the frequency 931.3125 MHz in Austin, San Antonio, Corpus Christi, McAllen, Brownsville/Harlingen, Laredo, TX, and surrounding areas. Through an inter-carrier agreement with Express Message Corporation, API also provides regional paging service in other areas in Eastern Texas on 931.3125 MHz. I am filing this declaration in support of API's petition to the Commission to reconsider its decision in WT Docket No. 96-18 to auction all geographic licenses for the 931 MHz band, regardless of the extent to which incumbent licensees already cover the areas to be included in the geographic licenses.

I have attached to this declaration a map showing the coverage of API's existing paging system on 931.3125 MHz in the Austin San Antonio, Corpus Christi, McAllen and Brownsville/Harlingen areas. As reflected in the map, its existing system essentially covers all of Bexar, Cameron, Hidalgo and Nueces Counties, Texas, as well as substantial populated areas in adjacent counties. According to the Bureau of the Census, the 1990 population just of the counties enumerated above was 2,120,204, which is more than 70 percent of the 1990 census population (2,986,524) of the entire San Antonio Major Trading Area. Therefore, it is evident that in the San Antonio MTA, no other entity could physically meet the performance standards promulgated by the Commission for geographic licensees and still provide interference protection to API's incumbent system.¹

¹ As the map also shows, API and Express already cover substantially all of Tarrant and Travis Counties in the Dallas MTA, and, when co-channel separation requirements are considered, their existing coverage essentially precludes anyone else from locating transmitters in Bastrop, Caldwell, Hays and Williamson Counties in the Austin area, or in Collin, Dallas, Denton, Ellis, Hood, Johnson, Kaufman, Parker or Rockwall Counties in the Dallas area. The 1990 census populations of all of these counties (4,760,623) is more than 49 percent of the population of the entire Dallas MTA, without even considering the fact that both carriers filed a number of additional applications in adjacent areas pursuant to the partial exemption from the current "freeze" which they expect to be operating prior to the auctions. It is thus evident that no other entity can physically meet the Commis-

The only purpose that could possibly be served by auctioning this license is to cause the bidding to be artificially inflated by entities that have no hope of meeting the performance standards if they won the license. Furthermore, if they were allowed to win the bidding, API's own expansion on 931.3125 MHz would be stifled during the five-year term of the license, which, conversely, would deny service improvements to the vast majority of the population in the licensed area. In short, absolutely no useful purpose would be served by conducting an auction for 931.3125 MHz in the San Antonio Major Trading Area, and substantial harm to the public could result from it.

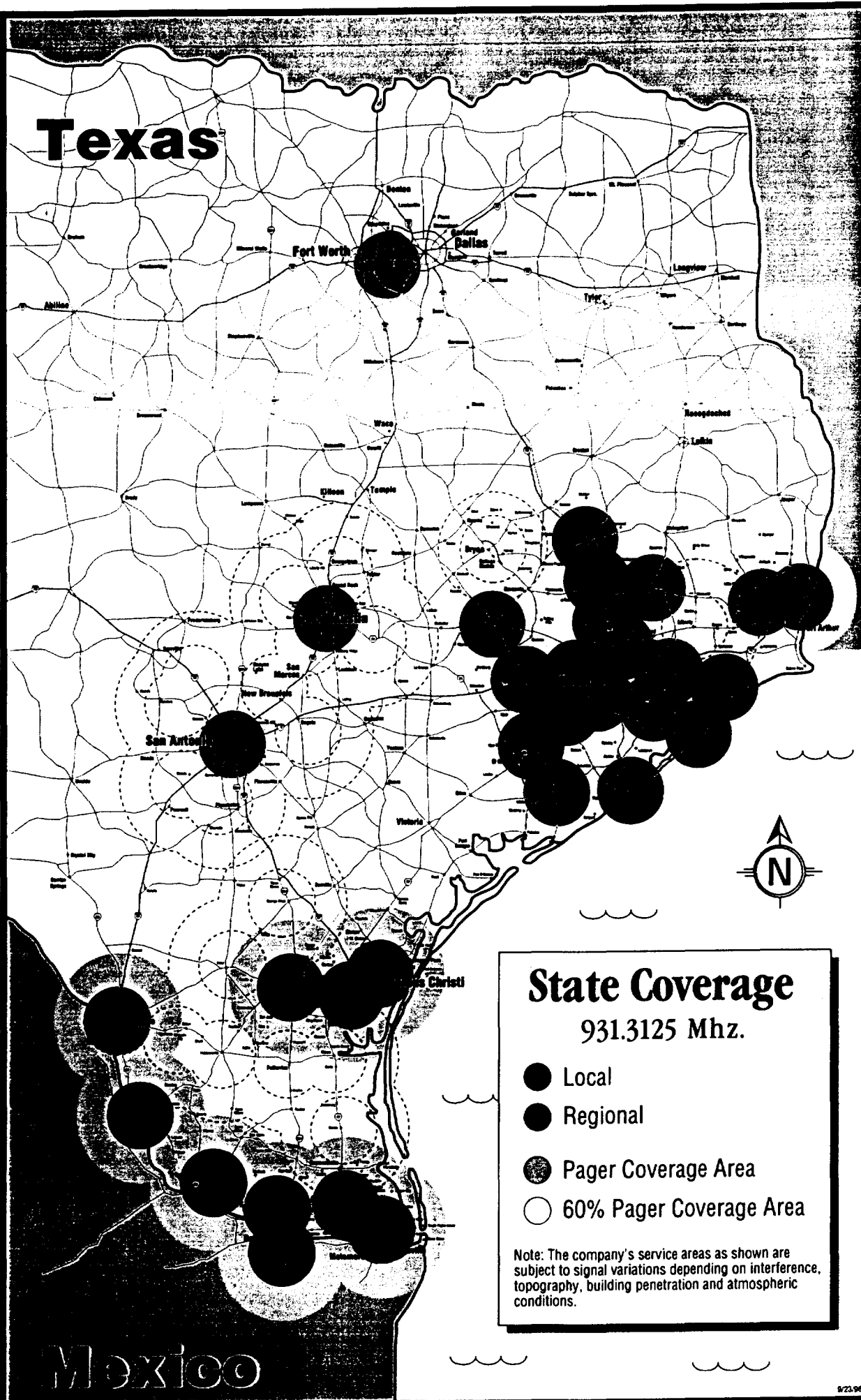
I declare under penalty of perjury that the foregoing is true and correct. Executed this 8 day of April, 1997.



Alan Yoder

sion's performance standards on 931.3125 MHz in the Dallas MTA.

Texas



State Coverage

931.3125 Mhz.

- Local
- Regional
- Pager Coverage Area
- 60% Pager Coverage Area

Note: The company's service areas as shown are subject to signal variations depending on interference, topography, building penetration and atmospheric conditions.

Mexico

EXHIBIT B -- DECLARATION OF MARK A. APSLEY

DECLARATION OF MARK A. APSLEY

MARK A. APSLEY hereby states as follows:

I am the licensee of PARS Station KNKP461, which I use to provide commercial paging service on the frequency 152.63 MHz in Boise, ID, and surrounding areas in southern Idaho and eastern Oregon. I am filing this declaration in support of my petition to the Commission to reconsider its decision in WT Docket No. 96-18 to auction all geographic licenses for the Part 22 VHF band, regardless of the extent to which incumbent licensees already cover the areas to be included in the geographic licenses.

I have attached to this declaration a map showing the coverage of my existing paging system on 152.63 MHz. As reflected in the map, my system essentially covers all of Ada and Canyon counties, as well as substantial populated areas of Elmore, Gem and Payette counties in Idaho and Malheur County in Oregon. According to the Bureau of the Census, the estimated 1995 population of Ada and Canyon counties alone was 360,525, substantially more than 70 percent of the estimated 1995 population of the Boise Economic Area. Therefore, it is evident that in the Boise Economic Area, no other entity could physically meet the performance standards promulgated by the Commission for geographic licensees and still provide interference protection to my incumbent system.

The only purpose that could possibly be served by auctioning this license is to cause the bidding to be artificially inflated by entities that have no hope of meeting the performance standards if they won the license. Furthermore, if I allowed them to win the bidding, my own expansion would be stifled during the five-year term of the license, which, perversely, would deny service improvements to the vast majority of the population of the licensed area. In short, absolutely no useful purpose would be served by conducting an auction for 152.63 MHz in the Boise Economic Area, and substantial harm to the public could result from it.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8 day of April, 1997.

Mark A. Apsley
Mark A. Apsley

PROGRESSIVE PAGING BOISE, IDAHO

COVERAGE AREA BY COUNTIES

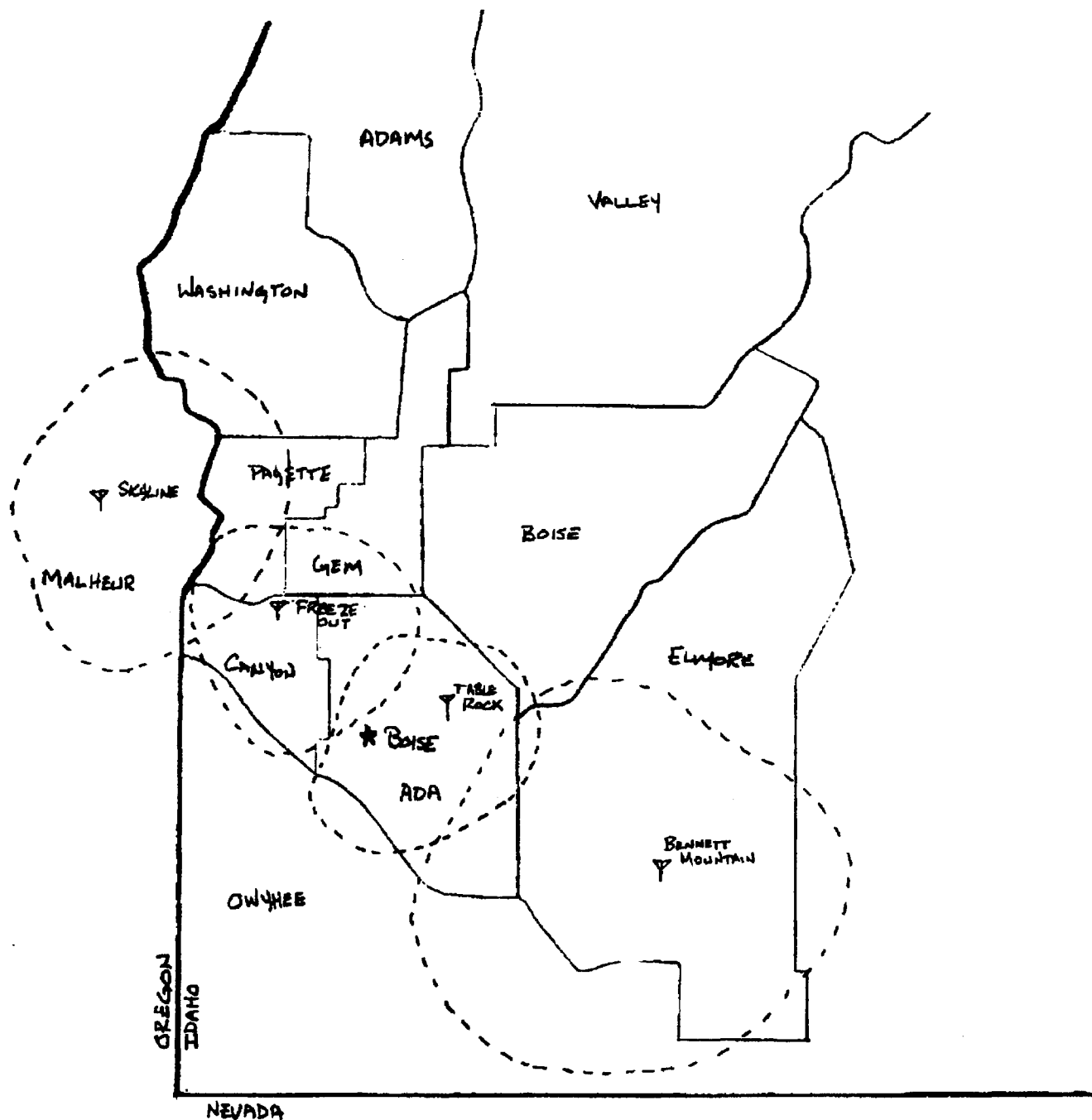


EXHIBIT C -- DECLARATION OF WILLIAM D. STONE

DECLARATION OF WILLIAM D. STONE

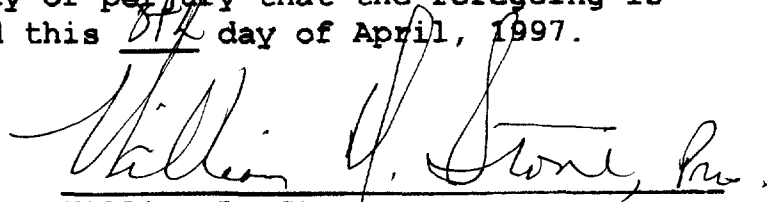
WILLIAM D. STONE hereby states as follows:

I am the President of Capitol Radiotelephone Company, Inc. (Capitol), licensee of PARS Station KQD614, which Capitol uses to provide commercial paging service on the frequency 152.51 MHz in Charleston, Huntington and Parkersburg, WV, and surrounding areas in West Virginia, Kentucky and Ohio. I am filing this declaration in support of Capitol's petition to the Commission to reconsider its decision in WT Docket No. 96-18 to auction all geographic licenses for the Part 22 VHF band, regardless of the extent to which incumbent licensees already cover the areas to be included in the geographic licenses.

I have attached to this declaration a map showing the coverage of Capitol's existing paging system on 152.51 MHz. As reflected in the map, its existing system essentially covers all of Gallia, Lawrence and Washington Counties in Ohio, Boyd County in Kentucky, and Kanawha, Boone, Mason, Jackson, Lincoln, Putnam, Raleigh, Roane, Cabell, Pleasants, Wirt and Wood Counties, West Virginia, as well as substantial populated areas in adjacent counties. According to the Bureau of the Census, the estimated 1995 population just of the counties enumerated above was 859,887, more than 70 percent of the estimated 1995 population (1,216,941) of the Charleston Economic Area. Therefore, it is evident that in the Charleston Economic Area, no other entity could physically meet the performance standards promulgated by the Commission for geographic licensees and still provide interference protection to Capitol's incumbent system.

The only purpose that could possibly be served by auctioning this license is to cause the bidding to be artificially inflated by entities that have no hope of meeting the performance standards if they won the license. Furthermore, if they were allowed to win the bidding, Capitol's own expansion on 152.51 MHz would be stifled during the five-year term of the license, which, perversely, would deny service improvements to the vast majority of the population in the licensed area. In short, absolutely no useful purpose would be served by conducting an auction for 152.51 MHz in the Charleston Economic Area, and substantial harm to the public could result from it.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of April, 1997.


William D. Stone